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TO RUEHC/SECSTATE WASHDC PRIORITY 3705
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RUEHBJ/AMEMBASSY BEIJING PRIORITY 3421
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RUEHCHI/AMCONSUL CHIANG MAI PRIORITY 2885
RUCPDO/DEPT OF COMMERCE WASHINGTON DC PRIORITY
RUEATRS/DEPT OF TREASURY WASHINGTON DC PRIORITY

UNCLAS SECTION 01 OF 02 BANGKOK 007650

SIPDIS

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STATE FOR EAP/MLS AND EB
STATE PASS TO USTR FOR WEISEL
COMMERCE FOR EAP/MAC/OKSA
TREASURY FOR OASIA
STATE PASS TO FEDERAL RESERVE SAN FRANCISCO FOR DAN FINEMAN
STATE PASS TO FEDERAL RESERVE NEW YORK FOR MATT HILDEBRANDT

E.O. 12958: N/A
TAGS: [ECON](#) [ETRD](#) [EINV](#) [TH](#)
SUBJECT: NEW INVESTMENT REGULATIONS PROPOSED

REF: A. BANGKOK 7435 ("GRAVE CONCERNS" ABOUT FOREIGN

INVESTMENT)

[1](#)B. BANGKOK 6363 (THAILAND PURSUES CASE AGAINST
SINGAPORE INVESTOR)

[1](#)C. BANGKOK 2978 (THAILAND: INVESTMENT SLOWDOWN)

[1](#)D. BANGKOK 788 (THE GREAT THAKSIN ASSET SALE)

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[1](#)1. (SBU) Summary. On December 28 a committee assigned by the Minister of Commerce to advise him about changes to the Foreign Business Act (FBA - the law which governs the ability of foreign firms to conduct business in Thailand's services and other sensitive sectors) submitted its report. Although the report has not been made public, Dr. Deunden Nikomborirak, Research Director at the Thailand Development and Research Institute and a member of the committee met with us and provided information about the committee's recommendations which include redefining ownership to include control and requiring companies to divest themselves of majority ownership if their current ownership structure is not sufficiently transparent. Very few US-owned firms are likely to be affected. End Summary.

[1](#)2. (SBU) Dr. Deunden explained that the committee charged with proposing changes to the FBA wrestled with several competing goals:

- End the utilization of nominee structures now used to get around FBA restrictions.
- Not frighten off foreign investors.
- Meet the political need of "proving" that the structure used by Temasek in purchasing former PM Thaksin's Shin Corp was illegal.

[1](#)3. (SBU) The committee proposed changing the definition of a "foreign" business entity from one in which a non-Thai owns 51 percent of the equity to one that includes a requirement that the majority owner also have a majority of voting rights (i.e. control over the Thai company). Dr. Deunden noted that this would be a departure from Thailand's WTO GATS commitment which limited foreign participation in Thai services companies to ownership but makes no mention of control. The committee suggests that those sectors which have their own

specific laws that include their own definition of "foreign" not be covered under the FBA. This would include banking and finance, insurance, air transport and tourism.

¶4. (SBU) The FBA contains three lists of activities prohibited to foreigners. List 1 is those sectors "not permitted to aliens for special reasons" which includes media, farming, ranching, forestry, fisheries and the purchase of land. List 2 comprises sectors relating to national security, national culture, natural resources and domestic transport. List 3 is businesses in "which Thai nationals are not yet ready to compete with foreigners" and specifically mentions 20 sectors including legal professions, construction, small retail, advertising, hotel and the catchall "other categories of service business." The committee report offered two options to the minister; to keep lists 1 and 2 as they are and liberalize list three by opening all sectors not specifically identified; or keep all three lists as they stand. The committee could not reach agreement on either option even after it was further proposed that any sector opened to foreign ownership would be subject to a review within two years to consider whether "too much damage" had been caused to domestic participants as a result of the liberalization.

¶5. (SBU) Finally, the committee recommended that foreign firms which have shareholding structures that clearly identify differing classes of stock, especially preferred shares and ordinary shares with differing voting rights, would be considered grandfathered. These firms would be required to identify themselves as foreign but would then automatically be issued with a foreign business license permitting them to continue to operate. The logic for permitting this type of structure to be grandfathered is that by identifying differing classes of stock the ownership arrangement was more transparent.

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¶6. (SBU) However, for companies which structured themselves through a series of holding companies and/or had identical classes of stock with differing voting rights or which used other means to disguise the actual control of the Thai entity, they will be given a certain period of time (six months to one year recommended in the report) to restructure themselves as a bona fide Thai-majority owned and controlled company. Presumably they would not be permitted to simply convert to a preference share structure since the rationale for the differentiation was that Shin Corp's transaction was structured through a series of holding companies acting as nominees for Temasek.

¶7. (SBU) Most US companies will be unaffected by these changes either because they are in manufacturing, are established under the bilateral Treaty of Amity which gives US investors national treatment in some services sectors, or because most US-associated law firms advised their clients to structure themselves using preference shares. We believe those most affected will be some of the big retail firms (Tesco, Carrefour, Makro), some distribution companies owned by Japanese electronics and auto firms, and telecom. But Dr. Deunden believes that even here, most companies will simply operate as before. She noted that these companies have been operating in Thailand without challenge for up to 30 years and that the Business Development Department of the Ministry of Commerce (responsible for applying the law) has only seven employees. She acknowledged, however, that these companies may not be willing to take the risk of operating illegally under the new regulations and could be subject to "being outed" by competitors.

¶8. (SBU) Comment: Commerce Minister Krirk-Krai was Thailand's representative to the WTO, so he is well aware of the risks Thailand will run if the country is seen as further limiting foreign ability to invest in Thailand. On the other hand, he is politically compelled to ensure that the Temasek-Shin

transaction is shown to be illegal. The forces of protectionism are clearly strong as demonstrated by the committee's inability to agree to any liberalization in return for further tightening of the definition of foreigner.

In any case, considerable foreign direct investment, which has been delayed pending a resolution to the FBA issue, will likely suffer further declines as at least some foreign firms will be forced to divest.

BOYCE